

FCC Relaxes Most Broadcast Ownership Rules

Dual TV Network Retained, Local Radio Rules Become More Restrictive

In a hotly-debated, much-anticipated action this morning, the FCC relaxed many of its broadcast ownership rules that have been the subject of its regulatory scrutiny over the past seven months. On a straight party-line vote (Chairman Powell, joined by Commissioners Abernathy and Martin with Commissioners Copps and Adelstein dissenting), the Commission voted to: (a) lift the newspaper/broadcast cross-ownership prohibition in all but the smallest cities; (b) lifting the cross-ownership restrictions between radio and television stations; (c) replace the foregoing two rules with a general cross media limitation combining the restrictions of both rules; (d) raise the national television audience cap from 35% to 45% of television households while retaining the UHF discount; and (e) raise the number of local television stations that can be owned by a single company to three stations if at least eighteen television stations in the market. The Commission retained the dual network rule prohibiting the merger of any of the top 4 broadcast television networks. The Commissioners did, however, vote to tighten the radio multiple ownership rules in Arbitron rated markets by shifting the definition of a radio market from one based on station contours to one based on Arbitron markets. The Commission opened a new proceeding to consider how to fashion new rules in non-rated radio markets.

The text of the Commission's action has not yet been released, and may not be out for quite some time, as the details of the Commission's actions were being finalized right up until the moment that the rules were adopted. Thus, while we know the outline of the Commission's actions from the explanations that were given at the open meeting and subsequent press conference, many of the fine points about the implementation of these rules will not be available until the final text is released.

National Television Ownership Limitation. On the national caps, the Commission raised the

limitation on audience share that one company can own from 35% to 45%. The Commission left in place the "UHF discount," thus the attributable audience for a UHF station remains half that of a VHF station in the same market. However, the Commission recognized that the reasons for the discount will be eliminated by the digital transition. Thus, the UHF discount will remain in place until the top 4 network stations in any market have completed the transition to digital operations, when it will sunset, unless the Commission reconsiders that decision in the interim period.

Based on these rulings, both Viacom and Fox, which already have temporary waivers allowing them to own stations which give them audience shares above the current 35% cap will be able to retain those stations. Other large groups, near the 35% threshold, may now be able to expand their holdings.

Local Television Ownership. The FCC lowered to 5 the number of television stations that must be present in a market before two television stations can be commonly owned. The Commission declined to make any change to its rule banning the combination of two of the top four rated stations in any market. Without giving details, the Commission indicated that, in smaller markets, where it could be shown that the merger of top 4 stations could serve the public interest, that limitation could be waived. This may permit some duopolies between two affiliates of the major television networks in the smallest markets. Also, the Commission's current waiver standards, which permit the acquisition of a failed or failing station by another local owner, was modified so that the acquiring owner need no longer demonstrate that there is no other willing buyer from outside the market before the acquisition is allowed.

In the largest of television markets, those that will have at least 18, companies will be able to own up to three television stations. It is anticipated that

this will happen only in the largest of television markets, and not even in all of them. The Commission estimated that 8 or 9 markets will fall into this category.

The Commission did tighten its local ownership rules in one way – determining that stations in the same Nielsen market, even if they do not have overlapping contours, will still be counted against the local limits. The Commission concluded that, as cable carriage is granted on a full market basis, the degree of over-the-air overlap is irrelevant.

Newspaper Broadcast Cross Ownership. Today's decision substantially repealed the Commission's 30 year old ban on the creation of local combinations of daily newspapers and broadcast stations. The FCC repealed that rule in all markets, replacing it with a more general rule restricting cross media ownership, which is discussed below.

Radio-Television Cross Ownership Restrictions. Today's action also repealed the limitations on the cross ownership of radio and television stations in the same market. The rule, which had been substantially relaxed in 1998, has now been eliminated. Thus, one owner can now acquire the radio and television stations in the same market – as long as such ownership is consistent with the rules for that service. However, ownership will be restricted pursuant to the general cross media limitation discussed below.

Cross Media Ownership Limitations. While abandoning the newspaper/broadcast and radio/television cross-ownership limitations, it adopted a more general limitation on cross media ownership in local markets. In markets with 9 or more television stations, there will be no limitations on the cross ownership of these different mediums. In markets with between 4 and 8 television stations, one company can own a daily newspaper, a television, and radio stations with up to 50% of the maximum number of radio stations that a company can own in such a market. If the newspaper owner does not own a television station, it can own the full complement of radio stations allowed under the local radio ownership rules. In markets with 3 or fewer television stations, no cross-media ownership will be permitted.

The Commission estimated that approximately 70 television markets have 9 or more television stations, 109 markets fall between 4 and 8, and 31 markets have 3 or fewer television stations.

Local Radio Ownership. Only the local radio ownership restrictions bucked the trend of deregulation. On these rules, the Commission actually has tightened the rules, prohibiting certain combinations that are permissible under the rules as they now stand.

Under the rules, the number of radio stations that one entity can own is determined by the number of stations that compete in the market in question. The more stations that are in a market, the more stations in that market one entity can own. While the Commission did not change the numerical limitations on how many stations one party can own in within a market, it did change the way in which markets are determined. Under the current rules, markets are defined by coverage contours – every station that has a city grade contour that overlaps the city grade contour of any station in the proposed combination is considered a potential competitor. Under the new rules, in Arbitron markets, only stations licensed to communities in the Arbitron metro, or otherwise considered “home” to the market, will be counted as being in the market. In many markets, this will dramatically reduce the number of stations that one party can own. The Commission did, however, conclude that non-commercial radio stations are marketplace competitors, and will be counted in determining how many stations are in a market. The Commission also will apparently eliminate all consideration of market share in determining whether combinations will be permitted.

In non-Arbitron markets, the Commission has not come up with new rules that will apply, but has instead opened a new proceeding to determine how markets will be defined. A temporary processing policy will be used in the interim, continuing to apply the contour overlap methodology, but excluding from the count of stations in a market any station with a transmitter site more than 58 miles from the perimeter of the overlap area of the stations that are being combined.

The Commission also determined that Joint Sales Agreements, that allow one company to sell the advertising time on a station that it does not own or program, will be counted as an attributable interest, as is the case with Time Brokerage Agreements and Local Marketing Agreements.

In the local radio ownership context, grandfathering is important, as a number of existing combinations would not be permissible under the new rules. The Commission decided that existing combinations will be grandfathered. However, nonconforming combinations cannot be sold in combination unless the sale is to an “eligible small business.” We assume that this will include minority- and female-controlled companies, and those that fall below certain revenue thresholds. From the discussion at the meeting, it appears that an eligible small business will have to hold the cluster it acquires for at least three years, and thereafter it can apparently transfer that cluster intact.

What impact the rule changes may have on the industry is impossible to predict at this time, particularly since the Commission's decision is likely to be appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

Indeed, it is that court that has twice chastised the FCC for keeping rules on the books that no longer can be justified as necessary. The Commission's action, however, although mandated by Congress as part of the "biennial review" process by which the Commission must review the current effect of its ownership rules every two years and determine if such rules are still necessary, could well wind up the subject of new legislation on Capitol Hill.

We have previously reported on this rulemaking proceeding in **Memorandum to Broadcast Clients**, BC No. 02-03 (October 29, 2002) and in **Memorandum to Broadcast Clients**, BC No. 03-01 (February 25, 2003). The Commission's rule changes will become effective after their publication in the *Federal Register*. For more information on the rule changes and how they may affect your competitive situation, please contact any of the lawyers in the Communications Practice Group.

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